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Case No. 20000979-SC

IN THE UTAH SUPREME COURT

In the matter of the

ESTATE OF KORY PASQUIN,

Argument Priority 15

Deceased.

Appeal from Amended Final Judgment on Kristie Madsen's
petition filed in an informal probate to have her child Karly Madsen,
a minor child, named as a child and heir of the late Kory Pasquin.

Third District Court
Salt Lake County

The Honorable Leslie A. Lewis, Presiding

THE ESTATE'S REPLY BRIEF

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REPLY ARGUMENT

POINT ONE

The Supreme Court's dismissal "without prejudice" of the "Pasquin I" appeal is dispositive of the issues raised by the Madsens in points 1, 2, 4, 5, 6, and 7 of their brief and the Supreme Court should award damages to the estate against the Madsens and/or their counsel for their failure to disclose "existing law" adverse to their position to the Supreme Court.

"Pasquin I" was concluded by having the Supreme Court decide whether the first appeal herein should be dismissed "without prejudice" as was contended by the estate or "with prejudice" as was contended by the Madsens. In urging the Supreme Court to dismiss "Pasquin I" with prejudice, the Madsens raised or could have raised the same points they now raise in points 2, 4, 5, 6, and 7 of their current brief. The Supreme Court rejected all the Madsens' contentions and dismissed the first appeal "without" prejudice.

Thus, points 1, 2, 4, 5, 6, and 7 were all previously decided on appeal.

Utah has effectively adopted a "pragmatic case-by-case approach to finality in probate matters." In the Matter of Estate of Morrison, 933 P.2d 1015 (Utah App. 1997) (Paragraph 4). The question of whether an order entered during an ongoing probate is final and appealable turns on whether the order "resolved an issue of vital importance" and "concluded a major phase" in the probate. In re Estate of Christensen, 655 P.2d 646 (Utah 1982).

The test that is applied to determine whether an order entered in an ongoing probate is final and ripe for appeal is whether or not the “failure to allow an appeal from such an order could compel all subsequent proceedings, including partial distributions, to go forward under a cloud of uncertainty that would seriously impair the personal representative’s efforts to administer the estate.” In re Estate of Christensen, *supra.*, (such as the order appealed in “Pasquin I” in which the probate court awarded “half” the estate to Karly Madsen even though the Madsens had proffered no pleading or proof limiting the children to two and there were, in fact, more than two children). Under the “pragmatic” approach taken in Utah, it made sense to appeal that order, since the claim by the Madsens to “half” the estate was completely untenable and the probate court’s order granting them same needed to be subjected to appellate review before the personal representative could prudently proceed with the probate. But once a stipulation was reached that would allow an amended order on that issue to be entered in the probate court, it made sense under the “pragmatic” approach to have the first appeal dismissed “without prejudice” so there could be some further proceedings in the probate court.

Using the “pragmatic” approach taken in Utah, the probate court once again took jurisdiction after the dismissal of the appeal “without” prejudice.

A subsequent “Amended Final Judgment” was then timely appealed.

Since the prior appeal was dismissed “without prejudice” and since the “Amended Final Judgment” thereafter entered by the trial court is now before this court on a timely appeal, this court has jurisdiction over the “Pasquin I” issues dismissed “without prejudice” and over all new issues that since arose.

Under Utah’s “pragmatic” approach, there was also no need to review attorneys’ fees on appeal until the Amended Final Judgment was entered and appealed, since the probate court might well have modified its earlier award based on the change in the operative facts of the case, reduction in the share of the estate distributed to Karly Madsen, and because one matter in which Karly Madsen had previously prevailed had now been completely reversed.

(One of the reasons remand is needed is to allow the trial court to enter findings of fact showing why she did not modify the earlier fee award at all.)

To briefly review the “Pasquin I” appeal history, it should be noted that a main issue involved the Madsens’ contention that Karly Madsen was entitled to “half” of the estate. The estate had timely objected to that part of the court’s final judgment in the probate court since nothing had been pled by Karly Madsen in her petition or proved by her at her trial to show that Kory Pasquin had only two children. While “Pasquin I” was on appeal, the mother

of Kory Pasquin's third known child came forward and petitioned the probate court to have her child recognized as a child and heir. In response, the estate pointed out that such an eventuality was the very reason the estate had elected to appeal the order awarding "half" of the estate to Karly Madsen. In a most predictable way, Karly Madsen formally opposed the petition of this third child's mother. Even though her attorneys call her a "little girl" engaged in a "four year battle to be recognized as the heir of her father" (Appellee's Brief, P. 9), this "little girl" was more than happy to oppose the efforts of another child's mother once the shoe was suddenly on the other foot. Her overly-dramatic self-misrepresentation as a little child victim involved in a battle is hardly supported by the record. She has been fully recognized as an heir by the estate for quite some time now, and the only matter that remains in dispute is the fee and cost award of over \$45,000 her lawyers want in a simple case where there was already a DNA test in place before they were ever retained.

As a practical matter, all they had to do was either call a competent foundational witness as to the existing DNA test or get a new court-ordered DNA test, but elected to do neither and now want to get \$41,212.50 in fees.

Judge Lewis declined to hear the petition of this third child's mother, since the Madsen petition was on appeal. The stipulation for a dismissal

without prejudice of the “Pasquin I” appeal was then entered into. Karly Madsen’s position on appeal had become completely untenable even to her.

Since there was no pleading or proof that there were only two children, and since the third child was already attempting to be recognized as an heir, Karly Madsen was simply not going to be able to hang onto “half” of the estate on appeal and there was likely going to be a remand so that the claim of the third child could be adjudicated in the probate court. “Pasquin I” was thus dismissed without prejudice. The points now raised by the Madsens concerning jurisdiction, the stipulation, and the various species of waiver and estoppel were all raised by the Madsens and rejected by the Supreme Court in “Pasquin I” and there is still no merit to the Madsens’ contention that the estate agreed to abandon anything dismissed “without prejudice” in “Pasquin I” or that any species of waiver or estoppel somehow arose under this history.

Rule 3.3(a)(3) of the Supreme Court’s Rules of Professional Conduct provides for “candor toward the tribunal” and required the Madsens’ counsel to duly “disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” Counsel for the personal representative did not disclose the decision in “Pasquin I” in the estate’s opening brief for

purposes of refuting the contentions now made by the Madsens in points 1, 2, 4, 5, 6, and 7 of their current brief because the estate could not reasonably have anticipated such a frivolous and meritless attempt to raise issues already decided in the first appeal. Since it was the Madsens who raised points 1, 2, 4, 5, 6, and 7, they should have disclosed in their brief both the fact that all of these points were already raised by them and rejected by the Supreme Court in “Pasquin I” and that the Supreme Court’s order in “Pasquin I” is “existing law” that controls these issues of law and is adverse to their clients’ position.

The Supreme Court’s dismissal order in “Pasquin I” was unpublished and “unpublished orders” constitute existing law with “precedential value . . . in the courts of this state . . . for purposes of applying the doctrine of law of the case, res judicata, and collateral estoppel.” (CJA 4-508) And since the Supreme Court’s order in “Pasquin I” constitutes “existing law” as to this case, the raising of points 1, 2, 4, 5, 6, and 7 coupled with the failure to make the required disclosure of existing law contrary to the position taken renders appellee’s brief a “frivolous brief” under URAP 33. It is not warranted by “existing law” (the order entered in “Pasquin I” by the Supreme Court).

The estate requests appropriate damages under URAP 33 determined after it is seen whether the Madsens now persist in points 1, 2, 4, 5, 6, and 7.

POINT TWO

This appeal involves only the award of “attorney’s fees and costs” to the Madsens’ attorneys. The status of Karly Madsen as a child of the late Kory Pasquin IS NOT at issue. The claim made in appellees’ brief that “issues regarding paternity” are argued in addition to “attorney’s fees and costs” is frivolous. Damages should be awarded under URAP 33.

The two issues argued on appeal are (1) whether there is any statutory basis for an attorney fee award in a paternity adjudication made for purposes of intestate succession and (2) whether the fee and cost award is excessive.

The Madsens have made the false representation in their brief that the estate “*argues issues regarding paternity* and the award of Karly’s attorney’s fees and costs” on this appeal. (Brief of Appellees, P. 26, emphasis added).

The reasonableness of the fee and cost award in the context of probate court paternity proceedings and lack of adequate findings of fact justifying the large fee and cost award are argued in the estate’s brief with some references to what was actually done on in the probate court. But Karly Madsen’s status as a child of the late Kory Pasquin is not raised, disputed, or argued by the estate. The Madsens’ brief is “frivolous” under URAP 33 in that it makes a material misrepresentation that is not “grounded in fact” herein. The estate requests damages under URAP 33. The degree, nature, size, and scope of sanctions should be determined after it is seen whether the Madsens persist in

their claim that the estate “argues issues regarding paternity . . .” or whether they promptly concede that only “attorney’s fees and costs” are at issue on appeal with a court filing that corrects the false statement made in their brief.

The Madsens do correctly point out that the estate raised not only the attorney fee award, but also \$3,933.25 in costs awarded to Karly Madsen as an appeal issue. The probate court already reduced costs claimed by Karly Madsen by over \$800 to get to the \$3,933.25. The remaining \$3,933.25 is excessive. Since Kristie Madsen never named Kory Pasquin as the father in the birth certificate during Kory Pasquin’s lifetime, and since he had expressly denied paternity during his lifetime even after the DNA test results had been provided, the estate’s reasonable position below was that a minimum amount of foundational evidence and testimony should be introduced by the Madsens at trial in order to have paternity facts decided by the jury, not by the personal representative. Some witness fees are, thus, proper. But it appears that the Madsens could have proceeded via a subpoena with a standard fact witness fee, since DNA testing had already been purchased. If the testing providers demanded payment beyond that, the court might have ordered payment to be limited to necessary court time by witnesses previously paid to perform DNA testing. A remand will allow for the entry of adequate findings on all of this.

POINT THREE

The Utah Uniform Probate Code contains no provision allowing attorney's fees to be claimed as part of the costs in this case, but allows only costs to be claimed. UCA Sec. 75-1-310 (1996) (R. 664)

Kristie Madsen did not name Kory Pasquin as the father of her child in the birth certificate (R.29) either before or after his death. Nor did she file a paternity action against Kory Pasquin during his lifetime. After his death, she still did not file a paternity action against his estate seeking amounts accrued prior to his death and such sums as may be payable for dependency. Instead, she only filed a petition within the informal probate of his estate seeking to establish a parent-child relationship for purposes of intestate succession only.

The Utah Uniform Act on Paternity in the Judicial Code provides:

78-45a-4. Limitations on recovery from father's estate.

The obligation of the estate of the father for liabilities under this act are limited to amounts accrued prior to his death and such sums as may be payable for dependency under other laws. UCA Sec. 78-45a-4 (2001)

The sole statute cited by appellees in the probate court and in point 3 of their brief in support of an attorney fee award is UCA Sec. 78-45a-5(4).

That statute does not apply to intestate succession because it is part of the Utah Uniform Act on Paternity, it is not part of the Utah Uniform Probate Code, and the Utah Uniform Act on Paternity comes into play only because

UCA Sec. 75-2-114 of the Utah Uniform Probate Code now makes reference generally to the Utah Uniform Act on Paternity and expressly to the genetic testing provisions therein and states that the “parent child relationship may be established as provided” therein. Establishing a parent-child relationship under the Utah Uniform Probate Code for purposes of intestate succession is very distinct from a paternity action. Under intestate succession in Utah, a parent can inherit by intestate succession from a deceased child. A living child could inherit under intestate succession from his or her deceased parent’s ancestors. In all such cases, the reference to the Utah Uniform Act on Paternity appearing in the Utah Uniform Probate Code at UCA Sec. 75-2-114 means the parent-child issue may be resolved using genetic testing under the procedures set forth in Title 78, Chapter 45a, but it does not mean that the parent of a deceased child could collect support or attorney’s fees under the Utah Uniform Act on Paternity from the deceased child’s estate or that a child of a deceased parent could collect support or attorney’s fees from a parent’s ancestor’s estate any more than Karly Madsen can now use the Utah Uniform Act on Paternity as a vehicle for recovering attorney’s fees in this probate.

The issue of Karly Madsen’s status as a biological child of the late Kory Pasquin was adjudicated for intestate succession purposes only. The

reference in the Utah Uniform Probate Code to the genetic testing chapters in the Utah Uniform Act on Paternity contains no attorney fee award language.

And if Karly Madsen were to now bring a paternity action against the estate for child support liabilities under the Utah Uniform Act on Paternity and it did not violate the time for bringing such an action under the applicable statute of limitations, the case would still be limited by UCA Sec. 78-45a-4.

It is also important to recognize even in a paternity case against a living father where fees are awardable under UCA Sec. 78-45a-5(4), which is the sole attorney's fee statute relied upon by appellees below and in their point 3 here, the fee award is not mandatory, but is discretionary and very limited.

UCA Sec. 78-45a-5(4) states as follows:

78-45a-5. Remedies. (4). The court may enter an order awarding costs, attorney fees, and witness fees in the manner prescribed by Section 30-3-3 upon a judgment or acknowledgement of paternity. UCA Sec. 78-45a-5(4) (2001)

By referencing Section 30-3-3 (divorce), the Utah Uniform Act on Paternity brings to bear divorce attorney fee law, meaning attorney's fees under the Utah Uniform Act on Paternity are in substance a form of support and alimony (subject to the same analysis of financial need, ability to pay, and the incomes of living parents as is applied to a support and alimony analysis.)

Thus, such a fee award does not fit into intestate succession at all.

If the inheritance were a large one, then there would be no need on the part of the recipient heir, because the heir could pay a reasonable attorney's fee out of the inheritance. (And the estate would lack the ability to pay because it would be an empty vessel after inheritances are distributed.)

If the inheritance were a small one, then there would not be any justification in running up a large attorney's fee (like the one in this case), since the "amount involved" would make a large attorney fee unreasonable.

The legal issue before the Supreme Court is, thus, whether an heir who has utilized genetic testing for purposes of establishing paternity for purposes of intestate succession under Utah Uniform Probate Code at UCA Sec. 75-2-114 can recover attorneys fees from the estate under UCA Sec. 78-45a-5(4).

It does not appear that any litigants other than the Madsens have tried to make the argument on appeal that it does provide such a basis under Utah statutes, and so this does present a question of first impression on this appeal.

The Supreme Court should hold that the reference made in the Utah Uniform Probate Code at UCA Sec. 75-2-114 to the Utah Uniform Act on Paternity at Chapter 45a, Title 78, of the Utah Code does refer to the genetic testing procedures therein but does not provide for the award of attorney fees.

POINT FOUR

In reply to the contentions in points 8 and 9 of the Madsens' brief, the findings of fact and conclusions of law of record require reversal and remand to satisfy the Estate of Quinn requirements.

The foregoing Point One through Point Three in this brief fully reply to points 1 through 7 of the Madsens' brief. Both Point 8 and Point 9 of the Madsen brief are hereby given a reply in this Point Four.

Consistent with the "pragmatic" approach taken to finality of orders in probate matters, it is vitally important to have the Supreme Court now decide whether there is a statutory basis for a fee award.

If there is no such basis, then that will conclude that matter.

If there is one, then "pragmatic" considerations would make it helpful for the Supreme Court to reverse and remand with instructions to the probate court to wait on awarding any attorneys' fees until the probate nears conclusion and an assessment can be made under the Estate of Quinn principles set forth in the estate's opening brief of the reasonableness of the fee in light of the value of inheritance thereby secured for Karly Madsen after administrative and other claims with priority are first paid and such an actual value can then be assessed and measured. None of that can yet be assessed or measured by the courts.

The personal representative, the Madsens, and the courts lack the clairvoyance and the prescience needed to assess and measure what the value of any inheritances will be, because one property interest is still tied-up in litigation between third parties. (R.356) The late Kory Pasquin owned a partnership interest. Any payment from the surviving partner(s) in conjunction with an accounting for his partnership interest by the surviving partner or partners will not be received by the estate until litigation between third parties over that partnership has ended.

Thus, whether or not \$41,212.50 can be justified by the “amount involved” and the “results obtained” cannot yet be determined because that portion of the inheritance distribution is uncertain and unknowable.

The “pragmatic” considerations in Utah law that govern whether to consider a matter on appeal or to send it back to the probate court where it can be revisited by the probate court, if necessary, strongly favor a remand. In doing so, the Supreme Court should instruct the probate court it is not precluded from revisiting matters so sent back to it “without prejudice” when there has been a change in the operative facts and/or where facts previously unknown and unknowable have become known. This will help promote orderly estate administration.

POINT FIVE

In further reply to the contentions in points 8 and 9 of the Madsens' brief, the estate preserved all issues raised on appeal.

The estate timely informed the probate court of its position that the proposed order awarding some \$45,000 in attorney's fees and costs should be "rejected and not signed." (R.657) Had the court done what the estate asked, deficiencies concerning lack of findings of fact and conclusions of law would not have arisen in the probate court. Since the court did sign the order over the estate's objection, the estate may now raise on appeal all of the errors that were made by the probate court as a consequence of that signing over the estate's objection, including the lack of findings of fact or conclusions of law supporting either the \$41,212.50 attorney fee award or the \$3,933.25 cost award.

In another timely filing well before the court signed the order, the estate pointed out its position that \$41,212.50 in this "simple case" appeared "excessive" and an "assistant attorney general working the paternity calendar for recovery services could likely prepare such a case in an afternoon and try it in less than a day" since DNA testing was done before the Madsens' attorneys were retained and when the

Madsens' attorneys requested the test results "the estate stipulated the (DNA) tests could be released and the court so ordered." (R.665)

The absence of conclusions of law (particularly as they relate to the absence of a statutory basis for the attorney fee award) was also preserved when the estate timely objected to the order well in advance of signing by filing the following objection to the attorney fee portion:

"The Utah Uniform Probate Code contains no provision allowing attorney's fees to be claimed as part of the costs in this case, but allows only costs to be claimed. UCA Sec. 75-1-310 (1996)." (R.664)

The need for adequate findings of fact and conclusions of law as to the \$3,933.25 cost award was also timely raised and preserved when the estate objected to the claimed costs in the probate court as follows:

"(C)osts were not recoverable at common law and are generally allowable only in the amounts and in the manner provided by statute. Frampton v. Wilson, 605 P.2d 771 (Utah 1980). The 'expert witness' testified that he was a custodian of state DNA testing records at the University of Utah and, therefore, as a records custodian, he could and should have been paid only the statutory witness fee. Further, the genetic testing statute in effect on the date of Kory Pasquin's death specifically provides that '(t)he fee of an expert witness called by a party but not appointed by the court shall not be taxed as costs in the action (emphasis added)' UCA Sec. 78-45a-9 (1996)." (R.664-665)

All appeal issues were raised and preserved below and should be heard on appeal under the "pragmatic approach" used in Utah probate.

POINT SIX

In reply to the contentions in points 9 and 10 of the Madsens' brief, Estate of Quinn requires entry of a finding of fact stating an approximate amount of Karly Madsen's inheritance. The lack of any pragmatic perspective on the part of the Madsens and their counsel as to the relationship between attorney fees and costs and the amount of her inheritance is not a basis for an excessive award.

The essence of the Madsens' arguments in points 9 and 10 of their brief is that the findings required under Matter of Estate of Quinn, 830 P.2d 282 (Ut. App. 1992), are "inherent" in the trial court's order.

However, since even the approximate amount of Karly Madsen's inheritance is unknown and unknowable at this stage of the probate due to third-party litigation, it cannot yet be "inherent" in the court's order.

Until it can be approximated, Estate of Quinn cannot be applied.

The Madsens and their counsel increased fees and costs by more than \$40,000 over the \$5000 that would be reasonable based on this:

"Karly was required to incur substantially more in legal fees because the Estate has employed an endless series of complex legal tactics that constitute conduct perhaps exceeded only by that of the poisoning princes of the Medici family of Renaissance Italy." (Aplee. Brief p. 32)

The failure to connect this subjective perspective on their part with the amount of Karly Madsen's inheritance makes this insufficient.

This argument does not satisfy the Estate of Quinn requirements.

Furthermore, even though it is the subjective claim of the Madsens and their counsel that this probate is a difficult one for them, the record shows no independent attempt by the probate court to characterize the fee as reasonable in light of any "endless" or "complex" legal tactics.¹ This case is comparable to Morgan v. Morgan, 795 P.2d 684 (Ut.App. 1990). Even though a lawyer characterized the fees as reasonable in light of the difficulty of the case, the absence of an "an independent attempt by the court" to so characterize the fees required a remand for "reconsideration of the award of fees and for entry of such additional findings as may be necessary" and as to the costs awarded:

"(W)itness fees, travel expenses, and service of process expenses are chargeable only in accordance with the fee schedule set by statute . "...
"Witness compensation in excess of the statutory schedule is generally inappropriate as a cost."... (Payments to witnesses in excess of the statutory schedule amounts do not constitute) "legitimate and taxable 'costs' " (but are) "expenses"..."which may be ever so necessary, but are not taxable as costs."

Thus, the attorney fee and cost award in this case should be reversed and remanded for "reconsideration of the award of fees" and costs "and for entry of such additional findings as may be necessary." The Supreme Court should also include a mandate directing the trial court to limit witness costs to only statutory witness fees, travel expenses, and subpoena service expenses.

¹ It should be noted that the Medici princes were responsible for fostering a very great flowering of the arts in Florence and also had the good sense to fire and jail the amoral leadership guru Machiavelli. If the personal representative's counsel's stamina and skill enabled him to employ endless and complex legal tactics comparable to those employed by historic personages, that is no small thing. However, since the trial court made no such finding, it appears the Madsens and their counsel are employing overdramatization in this matter. Further, since any such legal tactics successfully fended-off very vexatious litigation by the Madsens (such as their attempts to pursue discovery into the sex life of the estate's personal representative), it was good any such tactics were successfully used.

As set forth earlier in this brief, there is no provision for an attorney fee award in the probate code when the parent-child relationship is pled in a petition filed within an informal probate and is then adjudicated for intestate succession purposes only. The reference to the genetic testing and other provisions of Chapter 45a of Title 78 could be used to establish intestate succession from a child to a parent or from a parent's ancestor to a child just as easily as it could be used as a basis for parent to child intestate succession.

Further, recovery from a father's estate is limited even in a paternity action. The court should hold there is no statutory basis for a fee award.

In the event that the court holds that the reference to Chapter 45a of Title 78 incorporates more than just the genetic testing and other paternity establishment procedures therein, and incorporates the attorney fee provision therein, then the Chapter 45a reference to UCA Sec. 30-3-3 when stating the manner in which attorney's fees may be awarded would come into play. In that case, the court's failure to make findings of fact concerning the attorney fee award's reasonableness as required under Estate of Quinn also runs afoul of the cases which require findings of fact under Sec. 30-3-3 fee award cases.

Under those cases, the court must make findings of fact concerning the receiving party's need, the paying party's ability to pay, the reasonableness of the fee, and the subsidiary "earned income ratios" of the parties against which such determinations are made. Rehn v. Rehn, 974 P.2d 306 (Ut.App. 1998).

While "earned income ratios" are not a very good fit in a probate, it is clear that Sec. 30-3-3 would at least require a specific finding of fact as to the amount of Karly Madsen's inheritance on which to base need, ability to pay, and reasonableness. Reversal and remand are required under Sec. 30-3-3 so the trial court can do a Sec. 30-3-3 analysis based on the inheritance amount.

Another Madsen argument that warrants a brief reply is the raw comparison between their fee and cost claim of over \$45,000 with some \$40,000 in fees and costs allegedly incurred by the personal representative.

The Madsens refer to both numbers and then claim it is "ludicrous" for the estate to even question their fees and costs. In so doing, the Madsens are engaging in a written equivalent of raising one's voice rather than improving the quality of one's arguments, since the record shows that the personal representative had to retain legal counsel for a number of other legal matters.²

The raw comparison is, thus, pointless, meaningless, and gratuitous.

² The fatal accident in which Kory Pasquin was allegedly operating a speedboat while intoxicated also caused serious personal injuries to his passenger, who asserted a formal claim against the estate. Counsel for the personal representative successfully defended the estate in a manner that caused the claim to be withdrawn. A lawsuit was filed against the estate asserting a claim to one-third of shares of stock that had been owned by Kory Pasquin. The personal representative had her counsel secure summary judgment in favor of the estate. An attempt by the losing party to perfect an appeal was not successful and the Utah Court of Appeals declined to set aside the trial court's summary judgment in favor of the estate. An attempt by the losing party to then have the Utah Supreme Court take the case was denied. Geri Pasquin v. Estate of Kory Pasquin, et al., *cert denied*. January 26, 2000, Utah Supreme Court Docket No. 990823. The subject shares have now been distributed to the three children identified as heirs so far, subject to rights retained by the estate in the event they are needed to satisfy superior claims or to satisfy claims of equal priority on a *pro rata* basis. It should be noted that the same lawsuit also still seeks a portion of a partnership interest Kory Pasquin owned and is still pending between third parties. Although the estate is no longer a party, future payment to the estate for Kory Pasquin's partnership interest by the surviving partner or partners cannot be computed or paid to the estate until that litigation is concluded. The final amount of Karly Madsen's inheritance is, therefore, both unknown and unknowable. These and other matters caused the personal representative to reasonably incur legal fees beyond those incurred due to Kristie Madsen's petition to have Karly Madsen adjudicated to be an heir. The personal representative has not yet sought any reimbursement out of estate property for the legal fees and costs she has incurred in performing her duties. Raw comparison between the Madsens' legal fees for a single matter (where their initial success in getting "half" of the estate was eventually reversed) with the personal representative's legal fees for a number of additional matters (in which the estate fully prevailed) does not advance the analysis.

The Madsens' brief then lists various criteria that the courts should use in evaluating the reasonableness of a fee and asserts that the probate court must have used these, even though no such evaluation process by the court is even minimally revealed in the probate court's fee and cost order.

The probate court would have been unable to reasonably assess either the amount involved in the case or the result achieved because the amount of Karly Madsen's inheritance was and is still unknown and unknowable.

It was an abuse of discretion for the probate court to attempt to assess the reasonableness of the fees and costs without first determining the amount of Karly Madsen's inheritance so that this could be used as a yardstick.

POINT SEVEN

The sudden appearance of Yvette Madsen as a party on appellees' brief is simply another example of how this case was made difficult not by any complex legal tactics on the part of the estate, but by the Madsens' counsel's utter failure to distinguish between an informal probate and a civil lawsuit in their court filings and their use of the informal probate as a repository for all kinds of filings wholly unrelated to paternity.

Kory Pasquin had denied paternity as to Karly Madsen during his lifetime, even after DNA test results were obtained. Since Kristie Madsen never named Kory Pasquin as Karly Madsen's father on Karly Madsen's birth certificate, and since, even after obtaining some DNA test results, she never obtained either an adjudication of paternity or a court-approved agreement of paternity as required under the Utah Uniform Probate Code, the personal representative properly excluded Karly Madsen as a child and heir in the initial informal probate filings. This was both legally correct and prudent. A DNA test result is not a valid substitute for a birth certificate or a court order.

Yet, instead of simply filing and litigating a proceeding to establish Karly Madsen's legal status as a child and heir, Kristie Madsen started off right out of the chute by adding filings that called Candance M. Souter a liar for not including Karly Madsen as a child and heir of Kory Pasquin in the initial informal probate filing. Kristie Madsen's attorneys then proceeded to use the informal probate case file as a repository for various and sundry petitions and affidavits from the likes of Geri Pasquin and Julie Flarity which also did nothing to move the threshold issue of paternity forward, but instead continued to attack Candance M. Souter about her informal application for appointment, which they claimed was "false" for not naming Karly Madsen as a child and heir and with more unkind allegations that they did not support with anything concrete. Even though she is not a party below, yet another Madsen has now emerged on appeal claiming to be a party and to speak for the minor child Karly Madsen and has proceeded where the others left-off with allegations of "endless" and "complex" legal tactics by Ms. Souter.

An informal probate is not an open-ended repository for the filing of anything and everything. It is also not a civil lawsuit. Normally, one must proceed therein by petition, not by motion. If a legal dispute arises within the probate between parties with standing therein, it is then resolved according to the Utah Rules of Civil Procedure as between the parties with standing, and is not an open file for the filing of papers by anyone who cares to come along and file something. Instead of simply focusing on the very simple threshold question of paternity after the filing of Kristie Madsen's petition on that point, Kristie Madsen's attorneys continued to beat this worn drum well into the next year. On October 30, 1998, an attorney for Kristie Madsen (who then inexplicably claimed to represent only Julie Flarity and Karly Madsen, but

not Kristie Madsen) told a Third District Judge that some as yet unidentified "we" were still complaining about same: "We have serious concerns about representations she made to the Court in her informal application for appointment, which we think are false." (T.4, October 30, 1998 hearing.)

The judge gently reminded counsel that the first order of business was to resolve the threshold question of paternity to establish some standing and that Karly Madsen had not yet been legally adjudicated to be a child and heir.

To the extent that the spectacle of having persons claiming to speak for "little" Karly Madsen shuffle in and out of this case in the probate court and on appeal has increased her attorney's fees, it is not reasonable to require the estate to pay them. To the extent that parties who are before the court for the purpose of establishing paternity want to spend their attorney time beating their drum well into the next year about "serious concerns" they have based on their belief that it was "false" for the personal representative to decline to include in her initial probate filing someone who did not appear as a child of Kory Pasquin on any official birth record or in any court adjudication, the estate should not have to pay for the attorney time they spent on this pursuit.

Since the probate court awarded every last dime of attorneys' fees requested, and since that request culled-out only the time spent on Julie Flarity's non-paternity filings and activities, but not on the non-paternity filings and activities unrelated to Julie Flarity, a remand is now required to allow the probate court to cull-out all attorney time unrelated to paternity.

Only those filings and activities by lawyers that moved the issue of paternity towards a legal conclusion should be included in any fee award, and, as set forth previously in this brief, that should happen only if the appellate court concludes that an attorney fee award has a statutory basis.

POINT EIGHT

THE TRIAL COURT'S FAILURE TO ABIDE BY HER OWN ORDER AS TO FEES AND COSTS AND INAPPROPRIATE APPLICATION OF THE DOCTRINE OF "LAW OF THE CASE" WHERE THE OPERATIVE FACTS HAD CHANGED PRECLUDES THE APPLICATION OF ESTOPPEL SOUGHT BY THE MADSENS.

In further reply to the Madsens' arguments in their brief concerning various forms of estoppel, after "Pasquin I" was duly dismissed without prejudice, the probate court proceeded by reassuming jurisdiction and by promptly entering an order indicating that issues regarding attorney fees and costs were yet to be briefed and argued to her. Thereafter, at the urging of the Madsens, she improperly vacated that order and reinstated the earlier attorney fee order appealed in "Pasquin I" (dismissed without prejudice).

Since the operative facts had changed (the Madsens had given-up on the untenable award of "half" of the estate to Karly Madsen), it was error to reinstate the prior fee and cost award without entering new findings of fact and conclusions of law justifying the failure to make a new attorney fee and cost award. Just as court action on attorney fees requires entry of findings of fact and conclusions of law, inaction (such as the failure to reconsider after a change in operative facts) also requires findings of fact and conclusions of law. For example, when a court declines to make an attorney fee award and requires each side to bear its costs and attorney fees, the court must make findings of fact to justify this. Wilde v. Wilde, 969 P.2d 438 (Ut.App. 1998)

Once "Pasquin I" was dismissed without prejudice, Karly Madsen faced one of two outcomes: (1) Additional (court-ordered) DNA testing would establish paternity as to both Karly Madsen and Kody Marion (which

it did); (2) Additional court-ordered DNA testing would exclude paternity as to Kody Marion, which would leave Karly Madsen still exposed to appellate review of her failure to call as a foundation witness at trial a "lab technician... to...testify as to the chain of custody of the blood samples drawn ..." State Dept. of Social Services v. Woods, 742 P.2d 118 (Ut.App. 1987) In either case, her claim to "half" the estate could no longer stand unless and until the claims of any other children (and any women claiming to be married to Kory Pasquin who might also come forward) were barred. Accordingly, the probate court should never have vacated the order wherein she indicated she would look at attorney fees after the "Pasquin I" dismissal, and there simply is no basis under this record for imposing any kind of appellate estoppel.

CONCLUSION

The Supreme Court should hold that it was an abuse of discretion for the probate court to review the attorney fee and cost claim for reasonableness without first finding and expressly stating the approximate amount of Karly Madsen's inheritance, it should hold that the probate court's findings of fact are inadequate to facilitate appellate review, it should hold that witness costs should be limited to statutory service of subpoena, mileage, and witness fees, it should hold there is no statutory basis for an attorney fee award, it should then reverse and remand the entire fee and cost award, it should also award costs, and it should award damages to the estate in a sufficiently large sum.

DATED THIS 27TH DAY OF JULY, 2001.



ROBERT H. COPIER
Attorney for Candance M. Souter

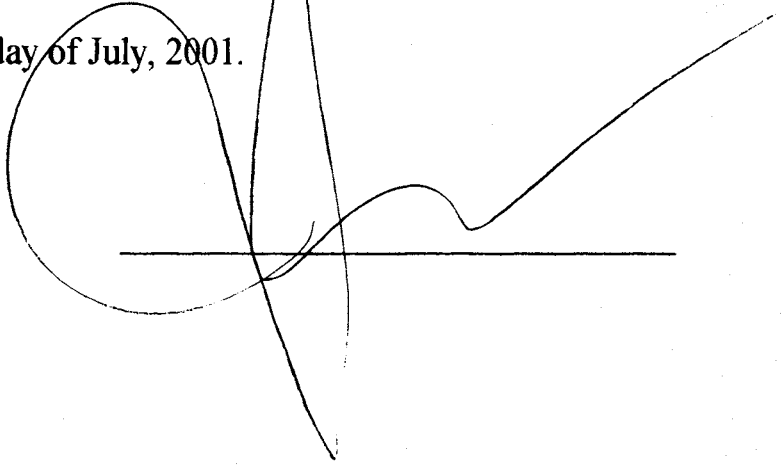
CERTIFICATE OF SERVICE

True copies of the foregoing were mailed to:

David W. Steffensen
Attorney for Karly Madsen and Yvette Madsen
2159 South 700 East, Suite 100, SLC UT 84106

Michael E. Day
Attorney for Sheri Marion
45 East Vine Street, Murray UT 84107

on this, the 27th day of July, 2001.

A handwritten signature, likely of Michael E. Day, is written over a horizontal line. The signature is a cursive-style name that starts with a large loop, crosses the line, and ends with a long, sweeping tail that extends to the right.